NO. 03-30262

[No. CR02-6067FDB, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICAH J. GOURDE

Defendant-Appellant.

APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING EN BANC

Appeal from the
United States District Court
for the
Western District of Washington
at Tacoma

The Honorable Franklin D. Burgess
United States District Judge

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No. 03-30262

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PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

I. PRELIMINARY STATEMENT

The United States petitions for *en banc* review of this case, in which a panel of this Court reversed a district court's order denying a motion to suppress, holding instead that the affidavit in support of the warrant lacked sufficient evidence on which to find probable cause. United States v. Gourde, 382 F.3d 1003 (9th Cir. 2004) (copy attached). Although the affidavit established that Micah Gourde took affirmative steps to become a paying member of a website described by its creator as a "child pornography" website, and he paid membership dues for two months until the website was shut down, the panel concluded that the

evidence failed to draw the "crucial link" between Gourde's connection to child pornography on the internet, and his possession of such materials, because the affidavit did not include evidence that Gourde actually downloaded child pornography onto his computer.

With this opinion, the Court has raised the bar for search warrants in computer-based child pornography cases beyond the standard of "fair probability that contraband or evidence of a crime will be found in a particular place" mandated by the Supreme Court precedents to a standard of virtual certainty. Moreover, the panel reached its conclusion, in part, based upon a perceived concession that the government had the actual means to track Gourde's usage of the website to determine that he downloaded images, see 382 F.3d at 1012, when the transcripts of the suppression hearing do not clearly evidence such a concession. The limitation created by this opinion will severely hamper the government's ability to pursue internet child pornography investigations to those cases where a defendant provided photographs to an undercover agent or to those cases where the government is lucky enough to seize a website server that created a means of tracking access and downloads from the website.

Because this opinion is in conflict with the Supreme Court precedents regarding probable cause, and this opinion will substantially impact the

government's ability to pursue child pornography investigations in this Circuit, the United States respectfully requests this Court to rehear this case *en banc*.

II. STATEMENT OF THE ISSUE

In order to establish probable cause to obtain a warrant to search a defendant's home and computer for evidence of possession of child pornography, must the government first obtain evidence that the defendant actually downloaded child pornography, where the government has established that the defendant sought out, joined and paid a monthly fee for the privilege of access to, and downloading from, a child pornography website?

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

At issue in this case is the search warrant executed on May 21, 2002, at Gourde's residence. Based upon the evidence obtained during the search, Gourde was indicted on December 19, 2002. CR 1.[1] Thereafter, Gourde filed a motion to suppress the evidence seized during the search. CR 20. An evidentiary hearing was held on February 19, 2003, at the conclusion of which the district court denied the motion. CR 34. Gourde then entered a conditional plea reserving the right to

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[1] "CR__" refers, by docket entry number, to the district court clerk's docket. "ER__" refers, by page number, to Appellant's Excerpts of Record.

appeal the denial of the suppression motion. SER 6. Gourde was sentenced to 21 months of imprisonment and remains on bond pending this appeal. ER 31.

B. Facts Contained in the Affidavit

This case results from an investigation of a website known as "Lolitagurls.com." The affidavit supporting the search warrant for the Gourde residence included the following facts about this website and Gourde's connection to it. ER 4-22.

The first page of "Lolitagurls.com" website described the purpose for the site as follows:

> Lolitagurls.com offers hard to find pics! With weekly updates and high quality pix inside, you cant [sic] go wrong if you like young girls! . . . Lolitas . . . Full size High Quality Pictures inside Join Now - instant access here! THIS SITE updated weekly WITH NEW LOLITA PICS This site is in full compliance with United States Code title 18 Part I Chapter 110 Section 2256.

Accompanying this message were images of nude and partially dressed girls some of whom appeared to be prepubescent.

From this page, the viewer was directed to a second page that provided three options: (1) a free tour of the website, (2) a means of joining the website, or (3) a means of access to the website for paying members who were permitted the ability to download the pictures. This second page contained the following statement:

> Welcome to Lolitagurls. Over one thousand pictures of girls age 12-17! Naked lolita girls with weekly updates! What you will find here at Lolitagurls.com is a complete collection of young girl pics. BONUS: You can get movies/mpegs at our partner site after you join if you wish. MEMBERS COMMENT ON THE SITE: "Wow! I have never seen so many good pictures of lolitas, thanks for updating often with lots of lolita girls pics ever! - David - usa "What a site! You have the best lolita girls pics ever!" Terrance - Europe. "Keep it up! This lolita site has everything with young girls!" - Eddie - Canada. "These lolita pictures are first in my collection/most lolita sites cost $30 or more but you have the best! - William - USA I was really stunned with surprise when joined your site. I've never seen in my life the pics of so cute preteen girls. But here I found an ocean of such pics!!! Thank you!" - Nikolay, Russia.

This statement was accompanied by small images of nude young girls, including pictures believed to be of prepubescent girls.

The membership fee for this website was $19.95 per month, paid through the use of a credit card provided to a different web payment site. Once a person joined the "Lolitagurls.com" website, this charge was automatically assessed until the user took affirmative steps to cancel the membership. Among the photographs that members could download were photographs with lascivious displays of the breasts and genitals of girls under 18. The website also contained some adult pornography.

Based upon this information and the observations of the website during a four-month period, in January 2002, agents executed a search warrant at the residence of the owner and operator of the "Lolitagurls.com" website. The computer seized at the residence contained photographs that agents had observed on the website during the investigation. Keith Fields, the "Lolitagurls.com" website owner, admitted that this was a child pornography website that he operated for profit.

Thereafter, agents obtained information from the separate site that collected the credit card payments on behalf of "Lolitagurls.com." These records included a record for Gourde establishing that he was a website member from November 2001, until the website was shut down in January 2002. Using the information from these records, agents located Gourde.

Along with information about the website, and Gourde's membership in it, the affidavit also provided a general description of how data is stored on a computer and the fact that even if a file is deleted, the actual data is not erased. Further, the affidavit detailed the manner in which collectors and distributors of child pornography use online resources to retrieve and store child pornography, the use of online storage accounts, and the characteristics of child pornography

collectors. It contained the conclusion of the agent that Gourde was a collector of child pornography.

Based upon this information, the Magistrate Judge issued a search warrant and the district court later found that these facts constituted probable cause for the search. The search of Gourde's computer pursuant to this warrant revealed hundreds of images consisting mostly of child pornography.

IV. THE PUBLISHED DECISION

The opinion in this case begins by finding that the search warrant for Gourde's home was sufficiently particular because it limited the search to evidence depicting minors engaged in sexually explicit conduct as defined by the relevant statutes. Gourde, 382 F.3d at 1008-9. It is on the question of whether the affidavit stated probable cause that the Court found the warrant to be deficient.

To reach this conclusion, the Court considered three cases, using the facts of those cases to guide its determination of whether there was sufficient evidence to establish probable cause. Those cases are United States v. Weber, 923 F.2d 1338, 1342 (9th Cir. 1991), United States v. Lacey, 119 F.3d 742 (9th Cir. 1997), and United States v. Hay, 231 F.3d 630 (9th Cir. 2000).

The Court concluded that the facts of Gourde were more like those in Weber, than those in Lacey and Hay. Based on that comparison, the Court noted

that the search warrant at issue did not draw a sufficient link between Gourde's activities with respect to the website and his possession of child pornography.

The Court observed that the Weber opinion "cautioned against creating a lengthy chain of inferences to buttress probable cause." Considering this admonition, the opinion then concludes that the inferences that a Court is expected to draw in this case were "unprecedentedly lengthy and improbable," describing these inferences as follows:

> (1) the website contained actual child pornography despite the affidavit's failure to verify the age of a single person depicted on the website; (2) Gourde was aware that the images were child pornography even though a disclaimer on the first page of the website stated that the images complied with federal law; (3) Gourde did not just "look around" the website or use it for some other legal purpose, but rather actually downloaded images; (4) the images Gourde downloaded were not the legal adult pornographic images offered by the website or images that only appeared to be child pornography; and (5) Gourde retained the images from January 2002 (the last month Gourde had access to the website) until May 16, 2002 (the date of the search warrant application).

Id. at 1011.

Having described the inferences in this fashion, the Court then stated "[a]n affidavit establishing that it is possible, with some straining to *infer* that Gourde - along with every other member of every site on the internet containing what

appears to be child pornography - might possess child pornography is not enough to justify a warrant to search Gourde's home and seize his computer." Id. The Court noted that the affidavits found to establish probable cause in Hay and Lacey each contained evidence that the defendants received or downloaded child pornography, and that in Hay, the affidavit recited evidence that the defendant had an extreme interest in young children.

The Court then observed that the government had the means to track Gourde's usage of the website and did not conduct this investigation,[2] finding this testimony to be a significant rebuttal to any claim that the holding in this case will inhibit the government's ability to prosecute child pornographers in the future. Id. at 1012. The Court then held that because the affidavit lacked evidence that Gourde had downloaded images from this mixed use website, there was insufficient probable cause to conclude that evidence of possession of child pornography would be found on Gourde's computer. In conclusion, the Court considered the good faith exception under United States v. Leon, 468 U.S. 897 (1984), rejecting its application in this case.

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[2] As set forth below, the evidence on this point was something less than definitive.

In his concurring opinion, Judge Gould noted that the opinion of the Court is required by the Ninth Circuit precedent in Hay, Lacey and Weber. Judge Gould went on to state, however, "were I to examine anew the issue whether law enforcement officials had probable cause to search Gourde's room and home computer for downloaded images of child pornography, and were I free to look only at first principles and Supreme Court precedent, I would be more inclined to decide that there was probable cause for this search made upon a warrant." Id. at 1014. Judge Gould specifically noted that "[t]he advertised focus of this website, coupled with Gourde's willingness to pay a nontrivial fee to access the site with its sleazy and illegal photos of young girls, tends to show, as a matter of relevance and probability, that Gourde most probably downloaded illicit images and then stored them on his computer or elsewhere in his room." Id. at 1014-15. Judge Gould concluded his concurrence by observing that we should not require a more rigorous probable cause standard for child pornography cases.

V. ARGUMENT

A. The Gourde Opinion is Inconsistent with the Standard of Probable Cause Defined by the Supreme Court

The Supreme Court has repeatedly stated that the probable cause standard is a "'practical, nontechnical conception' that deals with 'the factual and practical

considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Maryland v. Pringle, 124 S. Ct. 795, 799 (2003) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)). The Court has noted that the standard of probable cause "means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion." Locke v. United States, 7 Crach. 339, 348 (1813).

The Court has described this standard to require "only the probability, and not a prima facie showing, of criminal activity." Spinelli v. United States, 393 U.S. 410, 419 (1969). It exists when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690, 696 (1996). Probable cause is demonstrated if "under the totality of the circumstances, it reveals a *fair probability* that contraband or evidence of a crime will be found in a particular place." United States v. Celestine, 324 F.3d 1095, 1101 (9th Cir. 2003)(citing Illinois v. Gates, 462 U.S. at 238). Id. A judicial officer must make this determination based upon *common sense* given all of the circumstances set forth in the affidavit. Illinois v. Gates, 462 U.S. 213, 238 (1983).

The analysis undertaken by the Court in Gourde departs from the commonsense, totality-of-the-circumstances analysis mandated by the Supreme

Court. Instead, the Court has adopted a standard that subjects the probable cause determination to a technical parsing of the evidence that requires an overly demanding level of specificity and certainty. See, e.g., Gates, 462 U.S. at 235-36 ("The process does not deal with hard certainties, but with probabilities.") Instead of the fair probability standard adopted by the Supreme Court, Gourde requires the government to present proof that the defendant actually possessed child pornography before probable cause is satisfied. In short, the government now must prove that the crime of possession of child pornography has definitively occurred before it can search for evidence of the crime, a standard the Supreme Court never imposed.

Moreover, this is not a burden that this Court places on the government in the context of other crimes. For example, a statement by an agent that drug dealers routinely maintain evidence of drug dealing activities in these homes was found to constitute a sufficient basis for a search without direct evidence of a nexus between drug dealing and the home. See, e.g., United States v. Ayers, 924 F.2d 1468, 1479 (9th Cir. 1991). A higher standard should not be imposed merely because child pornography involves a search for images in a computer. As Judge Gould noted, this is not a victimless crime. Gourde, 382 F.3d at 1015. It is "harmful to child victims because it facilitates the illicit demand that leads to the

exploitation and degradation of children . . ." Id. (quoting United States v. Joyce, 357 F.3d 921, 930 (9th Cir. 2004).

Rather than an unsubstantiated set of inferences, the evidence contained in the affidavit in support of the warrant meets the standard of probable cause required by the Supreme Court. The evidence establishes that Gourde sought out and entered a website the name of which implies child pornography. See, e.g., United States v. Reedy, 304 F.3d 358, 361 (5th Cir. 2002). Although the website claimed to be legal, it also claimed to contain over 1,000 pictures of naked girls ages 12 to 17, and the laudatory material about the website mentioned photos of "young girls," "lolita girls," and "cute preteen girls." More importantly, the affidavit notes that the website owner and operator unequivocally stated that the site was a child pornography website operated as a source of income.

Gourde went to the second page of the website where the true nature of the website became clear, and once there, took a second affirmative step to join the website at a cost of $19.95 per month, accomplished by connecting to a second website in order to provide credit card information to pay for his membership. The second page of the website also allows a visitor the option of taking a "free tour" of the website. Thus, the act of obtaining membership has more significance since it is only with membership that a person is granted unlimited access to the

website and the ability to download images directly from the site. Gourde could have toured the website, observed that it was a child pornography website, and never joined as a member. Instead, Gourde agreed to pay $19.95 per month for the privilege of being allowed to download images from the website.

Moreover, once he joined this website, Gourde did not take affirmative steps to disassociate himself from it. His membership was terminated not by his actions, but rather by the fact that the website was shut down by law enforcement officials. The "non-trivial" cost of $19.95, paid for a second month, suggests that Gourde was not a one-time visitor to a website which he could tour for free. This strongly suggests that he was a person joining the website for the purpose identified by its creator and obtaining access to child pornography.

Although the Court in Gourde rejected a comparison to the facts in United States v. Froman, 355 F.3d 882 (5th Cir. 2004), nonetheless, a review of this case demonstrates the tension between the conclusions of the Gourde Court and those of the Fifth Circuit.

Of particular significance is the observation by the Court that it was "common sense that a person who voluntarily joins a group such as Candyman, remains a member of the group for approximately a month without cancelling his subscription, and uses screen names that reflect his interest in child pornography,

would download such pornography from the website and have it in his possession." Id. at 890-91. The Froman Court notes "Appellant essentially argues in the abstract that without evidence of actual possession of contraband, probable cause does not exist. We decline to adopt such a universal rule." Id. at 891.

Finally, the opinion of the Court is predicated, at least in part, on a mistake of fact. In its opinion, the Court emphasized that the government had "concede[d] that it had the means to actually track Gourde's usage of the site to determine whether he downloaded images," 382 F.3d at 1012, but either failed to do so or did not find such evidence. The transcripts of the suppression hearing, however, do not clearly evidence any such concession.

At the suppression hearing, the government's witness correctly stated that a search of the server operating the "Lolitagurls.com" website could have revealed information about Gourde's downloading history, but admitted that he did "not know" whether the "Lolitagurls.com" server was ever seized. To the witness' knowledge, only the personal computer of the website owner was seized. See ER 66. When asked whether the website owner's computer revealed Gourde's download history, the government witness initially responded, "I would assume so." ER 68. Later, he admitted that he "[did not] know whether" such basic information as the number of times a visitor logged into the website "could have

been determined by the computer that they seized," ER 76, and that he did not know whether the computer or server was even set up to keep a record of download transmissions. ER 77-78.

The importance of this erroneous conclusion cannot be overstated. The Court used this conclusion to find,

> there is no reason to think that the government's access to corroborating information in this case is atypical; one the government has gone through the motions necessary to procure a membership list (i.e., seized a website's computer and gained access to the website server), it likely also can access the necessary tracking information to demonstrate whether or not the subject of the investigation actually downloaded child pornography.

Gourde, 382 F.3d at 1012. Unfortunately, this conclusion finds no support in the record and makes assumptions wide from the mark.

Access to membership lists does not equate to access to the server. In Gourde, the affidavit makes clear that the source of the membership lists was an entirely separate website. Moreover, even if a server is found and seized, it is not a given that downloading information can be obtained. Indeed, where a website is operated for an illegal purpose, it serves the purpose of both the website owner and its members affirmatively to avoid tracking usage. It simply cannot be assumed that tracking information will be available.

Today, investigations involving the distribution, receipt and possession of child pornography center primarily on the internet, which has provided individuals interested in child pornography a means of identifying others with similar interests, as well as a significant means of obtaining and distributing this material, in large volume, through expedient channels. There exists a substantial societal interest in curbing the supply and demand for child pornography. This Court has observed:

> Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.

United States v. Weigand, 812 F.2d 1239, 1245 (9th Cir. 1987).

Law enforcement officers have based investigations of individuals for these offenses on contacts made through chat rooms and information of membership in web sites that offer child pornography. The gloss that the Gourde decision places on Weber now limits the government's ability to obtain search warrants to those cases where there is actual proof that child pornography was delivered to a particular computer - - as opposed to a "fair probability" that child pornography

was possessed by viewing in on a computer.[3] Whether an individual knowingly and actually possesses child pornography on a computer, and thus commits an offense, is a question properly presented to the trier of fact at a trial. On the other hand, whether there exists a "fair probability" that evidence of child pornography will be found in a particular place is an investigative question, the facts and circumstances of which, when based on common sense, would cause "reasonable and prudent" persons to inquire further.

The holding places this requirement above any reasonable inferences to be drawn from evidence regarding illicit web sites, coupled with the membership of individuals in those web sites. By imposing a standard higher than that applicable to other crimes, this Court has severely curtailed the government's ability to pursue these investigations.

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[3] It should be noted that the images viewed by an individual on the internet web site will remain in the temporary internet files on the computer, and thus remain possessed by the computer, until such time as the space constraints in the file cause it to be overwritten. ER 12-13, 15-16.

VI. CONCLUSION

Because the Gourde opinion conflicts with Supreme Court precedent on the standard of probable cause and is based, in part, on a mistake of fact, this Court should grant *en banc* review.

DATED this 15th day of November, 2004.

Respectfully submitted,

JOHN McKAY
United States Attorney

JANET FREEMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Appellee's Petition for Rehearing and for Rehearing En Banc were served this day by mail on counsel for Appellant at the following address:

COLIN FIEMAN
Federal Public Defender's Office
1331 Broadway Plaza, Suite 400
Tacoma, WA 98402

MAILED

Counsel for Defendant-Appellant
MICAH J. GOURDE

DATED this 15th day of November, 2004.

Lheilah Hasegawa, Legal Assistant

CERTIFICATE OF COMPLIANCE
WITH CIRCUIT RULE 40-1

I certify that pursuant to Circuit Rule 40-1 that the attached Appellee's Petition for Rehearing and for Rehearing En Banc has been prepared with proportionally spaced, 14 point typeface and contains 3950 words, less than the 4,200 words allowed.

JANET FREEMAN
Assistant United States Attorney

ATTACHMENT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MICAH J. GOURDE, *Defendant-Appellant.*	No. 03-30262 D.C. No. CR-02-06067-FDB OPINION

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
June 9, 2004—Seattle, Washington

Filed September 2, 2004

Before: Melvin Brunetti, M. Margaret McKeown, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Brunetti;
Concurrence by Judge Gould

COUNSEL

Janet L. Freeman, Assistant United States Attorney, Seattle, Washington, for the appellee.

Colin Fieman, Federal Public Defender's Office, Tacoma, Washington, for the appellant.

OPINION

BRUNETTI, Circuit Judge:

Appellant Micah Gourde entered a conditional guilty plea to one count of possession of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2) and 2256. As stated in the plea agreement, Gourde admitted possessing more than 100 images of child pornography on his home computer; however, Gourde conditioned his guilty plea on his right to appeal the district court's denial of his motion to suppress the images seized from his computer. He asserts that the affidavit in support of the search lacked sufficient indicia of probable cause because it contained no evidence that Gourde actually downloaded or otherwise possessed child pornography; moreover, he contends that the officers acted objectively unreasonable in relying on the allegedly unlawful warrant. We agree and reverse.

I. *Background*

a. *Facts*[1]

[1]The following facts are taken from the Affidavit of then-FBI Special Agent David Moriguchi in support of the search and seizure of Gourde's home computer and related property.

In August 2001, an FBI agent, acting in an undercover capacity, discovered a website called, "Lolitagurls.com," which described itself on its homepage as follows:

> Lolitagurls.com offers hard to find pics! With weekly updates and high quality pics inside, you cant go wrong if you like young girls! . . . Lolitas . . . Full size High Quality Pictured inside Join Now — instant access here! THIS SITE updated weekly WITH NEW LOLITA pics. This site is in full compliance with United States Code Title 18 Part I Chapter 110 Section 2256.

This page also contained several images of nude and partially dressed young girls.

The visitor to the website was then directed to a second page, where the visitor could either take a free "tour" of the site, join, or sign on if already a member. This page stated,

> Welcome to Lolitagurls. over one thousand pictures of girls ages 12-17! Naked Lolita girls with weekly updates! What you will find here at Lolitagurls.com is a complete collection of young girl pics. BONUS: You can get movies/mpegs at our partner site after you join if you wish. MEMBERS COMMENT ON THE SITE: "Wow! I have never seen so many good pictures of lolitas, thanks for updating often with lots of lolita girls pics ever!" — David — usa "What a site! You have the best lolita girls pics ever!" Terrance — Eruope "Keep it up! This lolita site has everything with young girls!" — Eddie — Canada "These lolita pictures are first in my collection/most lolita sites cost $30 or more but you have the best!" — William — USA I was really stunned with sur-

> prise when joined your site. I've never seen in my life the pics of so cute preteen girls. But here I found an ocean of such pics!!! Thank you!" — Nikolay, Russia"

This page also contained images of young girls, some of which the affidavit described as "prepubescent," under the caption, "Lolitas age 12-17."

The undercover agent joined the site using a credit card. Membership required a monthly fee of $19.95, which was assessed automatically each month unless the member took steps to cancel the membership. Lolitagurls.com employed Lancelot Security to process credit card and membership information. Once a "member," the agent obtained a password for unlimited access to the site. Images on Lolitagurls.com were updated every twelve to twenty days, and members could download the images directly from the site to their personal computers. During the approximately three months the agent was a member, he was able to download over 100 images. The site contained adult pornography, child pornography, and child erotica. The affidavit noted that some of the images the agent downloaded depicted sexually explicit poses of naked young girls.

The FBI investigation revealed that the owner of the website was Keith Fields of Hiawatha, Iowa. The FBI executed a search warrant of Fields's home; among the items seized was Fields's computer, which contained child pornography including images that were posted on Lolitagurls.com. Fields admitted that Lolitagurls.com was a child pornography website, which he operated as a source of income.

In response to a federal grand jury subpoena, Lancelot Security provided information to the FBI regarding members of Lolitagurls.com. Among the records obtained, FBI discovered information regarding "Micah Gourde" of "Castle Rock, Washington." The records revealed that Gourde used the

email address, "gilbert_95@yahoo.com," and that he listed his birth date as December 8, 1976. The membership information also indicated that Gourde had been a member of Lolitagurls.com from November 2001 through January 2002.

In addition to the facts recited above, the affidavit contained a section of definitions of terms such as "child erotica," "child pornography," "computer," "IP address," etc.; a comprehensive discussion of the logistical aspects of computer searches; a general explanation of the use of computers in the child pornography trade; and a lengthy recitation of the behavioral characteristics and methods of child pornography collectors.

The discussion regarding collectors of child pornography was based on the expertise of FBI Supervisory Special Agent James Clemente, who had worked in the FBI's Behavioral Analysis Unit since 1998. The affidavit also noted Clemente's extensive background and training in the areas of sex crime offenders and on-line sex crimes against children. The affidavit then described certain traits and characteristics that are "generally found to exist" in cases involving individuals who collect child pornography, including that the majority of child pornography collectors: (1) have a sexual attraction to children; (2) amass sexually explicit materials, including photographs, magazines, motion pictures, video tapes, books, slides, etc.; (3) "rarely, if ever," dispose of their sexually explicit materials and may go to great lengths to conceal and protect them from discovery, theft, and damage; and (4) often seek out like-minded individuals, either in person or on the Internet, to share information and trade child pornography and/or child erotica in order to gain status, acceptance and support as well as to "rationalize and validate their deviant sexual interest and associated behavior."

Following this discussion of the traits and tendencies of child pornography collectors, Moriguchi stated:

> The following facts lead me to believe that MICAH GOURDE is a collector of child pornography, and as such is likely to maintain for long periods of time a collection of child pornography and related evidence:
>
> a. GOURDE took steps affirmatively to join the website 'Lolitagurls.com', which advertises pictures of young girls and offers images of minors engaged in sexually explicit conduct.
>
> b. GOURDE remained a member of this website for over two months, although once he gained access to the website, he could have easily removed himself from its list of subscribers. During this time, he had access to hundreds of images, including historical postings to the site, which could easily be downloaded during his period of membership.
>
> c. Any time that GOURDE would have logged on to this website, he would have had to have viewed images of naked prepubescent females with a caption that described them as twelve to seventeen-year-old girls, yet he did not un-subscribe to this website for at least two months.

The affidavit also contained an attachment ("Attachment A") that described the items to be searched and seized, including "any computers, associated storage devices and/or other devices located therein that can be used to store information and/or connect to the Internet, for records and materials evidencing a violation of" the child pornography statutes.

b. *Proceedings Below*

Based on the affidavit in question, the magistrate judge issued a warrant to search Gourde's residence, particularizing the items to be seized as contained in Attachment A. Pursuant

to the warrant, officers searched Gourde's residence and seized his computer and its contents. Upon inspection, officers discovered hundreds of images of child pornography and child erotica.

Gourde moved to suppress the evidence obtained pursuant to the search of his computer and related items. He asserted that the affidavit failed to present sufficient evidence of probable cause. The district court conducted a hearing on the motion, at which Moriguchi testified about the investigation leading up to the warrant application. He explained that the undercover agent had joined the site and was able to download images off the website consisting of adult pornography, child pornography, and child erotica. Moriguchi also discussed other aspects of the affidavit including the information pertaining to computer searches as well as the section on characteristics of child pornography collectors. He testified that he had reason to believe that evidence of a crime would be found on Gourde's computer based on the fact that Gourde had been a member of Lolitagurls.com for two months and, during that time, he had access to hundreds of images of child pornography.

The government conceded that its four-month investigation of the Lolitagurls.com website prior to applying for the search warrant gave it the means to track Gourde's actual usage of the website. Nevertheless, on cross-examination, Moriguchi admitted that the affidavit contained no evidence that Gourde had "actually downloaded, received, transmitted or in any way otherwise possessed child pornography." Moreover, Moriguchi agreed that the affidavit did not indicate when the pictures of young girls referred to in the affidavit appeared on the home or subscription page of the site. Gourde's counsel also established through his cross-examination questions that the undercover agent had little or no expertise or ability to determine the age of a person depicted in a two-dimensional image; indeed, Moriguchi conceded that the affidavit contained only the undercover agent's subjective impressions of

the ages of the girls in the images. In sum, however, Moriguchi stated, "We had probable cause to believe that [Gourde] was a paid subscriber to the site that had the images on there," and that Gourde would have images on his computer based on access to a site that advertised "over 1,000 pictures of girls 12 to 17."

The district court determined that the evidence in the affidavit supported a fair probability that evidence of a crime would be found on Gourde's computer. The judge applied a "common sense approach" to conclude that evidence of a subscription to even a "mixed" site—one that offered both legal adult pornography and illegal child pornography—provided the necessary "fair probability" to "look further"; he therefore denied the motion to suppress. Upon this ruling, Gourde opted to plead guilty on the condition that he would retain the right to appeal the ruling to this court.

II. *Discussion*

a. *Standard of Review*

We review a motion to suppress de novo. *United States v. Jones*, 286 F.3d 1146, 1150 (9th Cir. 2002). We review for clear error, however, whether the magistrate had a substantial basis for concluding probable cause existed and accord "great deference" to the magistrate's determination of probable cause. *United States v. Hay*, 231 F.3d 630, 634 n.4 (9th Cir. 2000). The magistrate's responsibility in determining whether to issue a search warrant is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

b. *Sufficiency of the Warrant*

The Warrant Clause of the Fourth Amendment provides:

> No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[1] The Warrant Clause therefore requires compliance with two related but distinct rules. "First, it must describe the place to be searched or things to be seized with sufficient particularity, taking account of the circumstances of the case and the types of items involved. Second, it must be no broader than the probable cause on which it is based." *United States v. Weber*, 923 F.2d 1338, 1342 (9th Cir. 1991), *as amended on denial of rehearing* (internal citations and quotation marks omitted). The particularity rule requires the warrant to describe precisely those items to be seized, "since vague language can cause the officer performing the search to seize objects on the mistaken assumption that they fall within the magistrate's authorization." *Id.* (internal citations and quotation marks omitted). "The probable cause rule prevents the magistrate from making a mistaken authorization to search for particular objects in the first instance, no matter how well the objects are described." *Id.*

[2] The search warrant at issue here was sufficiently particular. In *Weber*, we held that a warrant authorizing a search for materials depicting "minors involved in sexually explicit conduct" met the particularity requirement of the Warrant Clause. *Weber*, 923 F.2d at 1413; *see also United States v. Rabe*, 848 F.2d 994, 997-98 (9th Cir. 1988) (same); *United States v. Kimbrough*, 69 F.3d 723, 727 (5th Cir. 1995) (holding warrants authorizing search for materials related to child pornography to be sufficiently particular where the language properly limited the executing officers' discretion by informing them of the items to be seized); *United States v. Hall*, 142 F.3d 988, 996-97 (7th Cir. 1998) (holding warrant authorizing search of suspect's home and computer to be sufficiently particular where warrant emphasized that items sought were related to child pornography). The warrant here closely

resembles those we approved in *Rabe* and *Weber*. Although the affidavit underlying the warrant sought permission to search numerous types of computer-related equipment and various storage media, the warrant limited the search to evidence depicting minors engaged in sexually explicit conduct as defined by the pertinent statutes. This description sufficiently safeguarded against the executing officers performing an unduly haphazard search.

[3] Whether the search warrant was supported by probable cause presents a closer issue. Three of our cases are particularly instructive on this point: *Weber*, *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), and *Hay*, 231 F.3d 630. The fact-intensive nature of the probable cause inquiry demands a close look at these cases, which provide useful guideposts for determining when probable cause is sufficient and when—as in this case—it is not.

In *Weber*, we reversed the lower court's denial of the defendant's motion to suppress because the warrant lacked sufficient indicia of probable cause. *Weber*, 923 F.2d at 1346. There, customs agents seized a package at the border addressed to "P. Webber," which the agents concluded "*apparently* depict[ed] the sexual exploitation of children." *Id.* at 1340 (emphasis in original). Weber was notified of the package but did not claim it. *Id.* Customs targeted Weber for investigation and, some twenty months later, Weber was sent an undercover "test advertisement" containing the name and address of a purported distributor of sexually explicit materials in Canada, although the distributor was in fact a fictitious creation of the United States and Canada Customs Service. *Id.* The advertisement described, but did not actually display, certain pictures for sale and claimed the pictures featured "boys and girls in sex action." *Id.* (internal quotation marks omitted). About a month later, Weber ordered four sets of pictures listed in the advertisement. *Id.* The pictures were to be delivered to Weber on June 12 by undercover United States Cus-

toms Service Special Agent Trevor Burke dressed as a delivery courier. *Id.*

Based on these facts, plus a general description of the proclivities of pedophiles, Burke stated in the warrant application his belief that on June 12 officers would discover not only the four sets of pictures that were to be the subject of the controlled delivery but also an extensive list of other materials depicting minors engaged in sexually explicit conduct. *Id.* at 1340-41. The description of the characteristics of pedophiles was based on Burke's experience and training in child pornography investigations as well as on his discussions with another law enforcement agent with experience in these types of crimes; however, nowhere in the affidavit did Burke conclude that Weber's sole act of ordering four sets of pictures from the fictitious catalog necessarily placed him in the category of pedophiles, molesters, or child pornography collectors. *Id.* at 1341.

[4] We held that this evidence did not establish probable cause to search for anything but the four sets of photos Weber had ordered from the phony advertisement. *Id.* "[P]robable cause to believe that *some* incriminating evidence will be present at a particular place does not necessarily mean that there is probable cause to believe that there will be more of the same." *Id.* at 1344 (emphasis in original). For this principle, we referred to *VonderAhe v. Howland*, 508 F.2d 364 (9th Cir. 1974), which involved an IRS investigation. *Weber*, 923 F.2d at 1342. After an audit revealed that a dentist's patient records adequately reflected reported income, the IRS received information from the dentist's employees indicating that, although the records produced for the audit on white cards might have appeared in order, the dentist actually kept a secret set of records on yellow and green cards. *VonderAhe*, 508 F.2d at 366. Based on this information, the IRS agent sought a warrant to search all of the dentist's books and records, "including, but not limited to, dental patient cards." *Id.* We concluded that, although there was probable cause to

believe that evidence of criminal activity might be found on the yellow and green cards, it was unlikely that the white cards would contain incriminating evidence, and thus there was no probable cause for the broader search. *Id.* at 369. Applying this principle to the *Weber* case, we concluded that the affidavit lacked probable cause to search for anything but the four sets of photos Weber had ordered from the phony advertisement. *Weber*, 923 F.2d at 1346.

We also assessed the sufficiency of a warrant application in *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997). In *Lacy*, as here, the defendant utilized his computer to acquire images of child pornography. There, however, the investigation revealed and the affidavit stated that Lacy had actually downloaded at least two GIFs (a digital image format) depicting minors engaged in sexual activity from a host site, providing evidence that Lacy "actually received computerized visual depictions of child pornography." *Id.* at 745. Although we acknowledged that, under *Weber*, "[e]vidence the defendant has ordered child pornography is insufficient to establish probable cause to believe the defendant possesses such pornography," we concluded there was sufficient evidence of Lacy's actual possession via downloading of child pornography to warrant the search. *Id.*

Most recently, in *United States v. Hay*, we again emphasized the importance of evidence bearing on a defendant's actual possession of child pornography. In that case, we upheld a search warrant where the supporting affidavit established that Hay had actually received via direct digital transfer nineteen images of minors engaged in sexually explicit activity—evidence supporting inferences that Hay had communicated with the sender, authorized the images' transfer, and possessed contraband images. *Id.* at 632-35. In addition to providing evidence of a direct and deliberate image transfer, the *Hay* affidavit provided evidence of Hay's "extreme interest in young children" by establishing that Hay's personal website described extensive contacts with children, such as

teaching skiing and swimming to preschoolers, babysitting, and working as a preschool camp counselor.

[5] We conclude that this case is much more like *Weber* than *Lacy* or *Hay*. As in *Weber*, the evidence underlying the search warrant at issue here fails to draw the crucial link between Gourde's having some attenuated connection to child pornography and his actually possessing it. As noted above, the evidence presented to the magistrate included only that Gourde (1) affirmatively subscribed to an internet pornography service that advertised "over one thousand pictures of girls ages 12-17!" and displayed several thumbnail images of girls who at least appeared to be "prepubescent" on the subscription page; (2) had unlimited "access to hundreds of images, including historical postings to the site, which could easily [have been] downloaded during his period of membership" and "would have had to have viewed images of naked prepubescent females with a caption that described them as twelve to seventeen-year-old girls"; and (3) failed to unsubscribe to the site for at least two months. The affidavit also provided expert opinion evidence of the proclivities of child pornography collectors and opined that Gourde's affirmative act of subscribing to Lolitagurls.com and failure to unsubscribe provided a sufficient basis to place Gourde in that category.

In *Weber*, we cautioned against creating a lengthy chain of inferences to buttress probable cause. *Weber*, 923 F.2d at 1344-45. Yet, in this case, concluding that Gourde actually possessed child pornography requires making several inferential leaps. In *Weber*, the government's affidavit established that, on one occasion, someone had sent what appeared to be child pornography to Weber, and that, on another occasion, Weber had responded to a reverse sting operation by ordering four images advertised in terms that implied that the images depicted child pornography. We held that these facts were not enough to establish probable cause that Weber possessed items similar to the images that he had ordered from the

United States and Canada Customs Services (i.e., that he possessed a child pornography collection beyond the four pictures he had ordered).

Here, the chain of inferences that the government asks us to draw is unprecedentedly lengthy and improbable. From the fact that Gourde became a paying member of Lolitagurls.com for two months (indicating that, at a minimum, he viewed a couple of pages of the site, including a page claiming that all of the material on the site was legal, and submitted his credit card number to "join"), the government asks us to infer that: (1) the website contained actual child pornography despite the affidavit's failure to verify the age of a single person depicted on the website; (2) Gourde was aware that the images were child pornography even though a disclaimer on the first page of the website stated that the images complied with federal law; (3) Gourde did not just "look around" the website or use it for some other legal purpose, but rather actually downloaded images; (4) the images Gourde downloaded were not the legal adult pornographic images offered by the website or images that only appeared to be child pornography; and (5) Gourde retained the images from January 2002 (the last month Gourde had access to the website) until May 16, 2002 (the date of the search warrant application).

[6] Even more so than in *Weber*, therefore, where the government asked us to infer that a defendant's ordering child pornography supported an inference that he received and retained other child pornography:

> Each of these inferences standing alone may be reasonable. But with each succeeding inference, the last reached is less and less likely to be true. Virtual certainty becomes probability, which merges into possibility, which fades into chance. The fourth amendment requires a "fair probability" that the items searched for will be found.

Weber, 923 F.2d at 1345. An affidavit establishing that it is possible, with some straining, to *infer* that Gourde—along with every other member of every site on the Internet containing what appears to be child pornography—might possess child pornography is not enough to justify a warrant to search Gourde's home and seize his computer. In making its probable cause decision, the district court reasoned:

> There has been discussion about the site being a mixed site. Well, does half legal make it something to destroy probable cause? What are we talking about here? Do you have to say that somebody actually saw something to believe or come to the conclusion that probable cause, or your common sense tends to indicate to you that this is why we do things. Kind of like when in a restaurant, I guess, you take the menu and order something we don't want to eat? Do we do that? Is that a common sense approach to things?
>
> . . . . But I'm thinking, and it's my common sense thinking to me, telling me there is reason here given a fair probability, more likely than not, that this [possession of child pornography] is what this subscription was about, which means a reason to look further.

Although the district court used its "common sense" to conclude that membership alone in even a "mixed" site (a site that contained both child and adult pornography) satisfies probable cause for a search warrant, the Fourth Amendment demands more.

Indeed, both the *Hay* and *Lacy* courts emphasized that the respective affidavits at issue contained additional corroborating evidence supporting a finding of probable cause. In both *Hay* and *Lacy*, for example, we referenced evidence that the defendants had actually downloaded or received digital

images depicting child pornography; and in *Hay*, we noted that Hay's website demonstrated Hay's inordinate involvement with children, which we described as Hay's "extreme interest in young children." *Hay*, 231 F.3d at 634.

Notably, the government concedes that it had the means to actually track Gourde's usage of the site to determine whether he downloaded images. It is not clear from the record, however, whether the government (1) chose not to avail itself of the information or (2) found no evidence of downloading. This uncertainty provides an important rebuttal to the argument that not finding probable cause here will inhibit the government's ability to prosecute child pornographers in the future. Simply put, there is no reason to think that the government's access to corroborating information in this case is atypical; once the government has gone through the motions necessary to procure a membership list (i.e., seized a website's computer and gained access to the website server), it likely also can access the necessary tracking information to demonstrate whether or not the subject of the investigation has actually downloaded child pornography. Requiring the government to buttress its affidavit with personalized information linking a website member to actual child pornography strikes a reasonable balance between safeguarding the important Fourth Amendment principles embodied in the probable cause requirement and ensuring that the government can effectively prosecute possessors and distributors of child pornography.

The government urges us to follow the Fifth Circuit's recent decision in *United States v. Froman*, 355 F.3d 882 (5th Cir. 2004); however, our decision here is not in conflict with the Fifth Circuit's precedent. In *Froman*, the court upheld a search warrant where the government provided evidence that Froman was a member of a group whose "singular goal . . . was to collect and distribute child pornography and sexually explicit images of children," *id.* at 884; members of the group could choose to automatically receive emails with attached

images, *id.* at 890; and the affidavit contained personalized evidence regarding Froman's interest in child pornography by way of his chosen screen names, "Littlebuttsue" and "Littletitgirly," *id.* at 891. None of these facts bearing on Froman's actual possession of child pornography is present here.

[7] We therefore conclude that the affidavit here failed to establish a fair probability that contraband or evidence of a crime would be found on Gourde's computer. Unlike in our circuit's cases of *Lacy* and *Hay*, there was no evidence here that Gourde actually downloaded any child pornography from the Lolitagurls.com website; rather, much like the catalog order described in *Weber*, the affidavit here revealed only that Gourde had subscribed, and thereby received access, to a mixed-pornography website, which is insufficient to create a fair probability that evidence of possession of child pornography would be found on Gourde's computer or related equipment. Further, unlike in the Fifth Circuit case of *Froman*, there was no evidence presented to the magistrate here that a Lolitagurls.com subscription involved automatic email transmissions containing child pornography or any other evidence indicating Gourde's sexual interest in children, such as suggestive screen names.

In sum, unlike in those cases where evidence of a subscription to an exclusively child pornography website was coupled with other corroborating information, the facts presented here established only that Gourde subscribed to a mixed pornography website and remained a member for two months. These facts—even when bolstered with the boilerplate language describing the characteristics of child pornographers and Agent Moriguchi's opinion that Gourde's actions placed him in that class—fail to provide a sufficient foundation on which to establish probable cause; indeed, with each inferential leap, "[v]irtual certainty bec[ame] probability, which merge[d] into possibility, which fade[d] into chance." *Weber*, 923 F.2d at 1345. Because the Fourth Amendment requires a "fair probability" that the items searched for will be found, we cannot

agree with the district court that this affidavit sufficiently established probable cause.

III. *Good-Faith Exception Under* United States v. Leon

[8] Even if an affidavit lacks sufficient evidence on which to find probable cause, we may nonetheless uphold a district court's denial of a motion to suppress on the good faith exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Court concluded that, although the exclusionary rule "effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 918-19.

[9] "It is necessary to consider the objective reasonableness not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it[.]" *Id.* at 923 n.24. The objective standard "requires officers to have a reasonable knowledge of what the law prohibits." *Id.* at 919-20 n.20. An officer does not "manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 899. However, because law enforcement officers are not lawyers and because they must often make "hurried judgment[s]," *id.* at 914, "courts should not exclude probative evidence when officers make reasonable mistakes in obtaining a warrant." *Weber*, 923 F.2d at 1346.

In *Weber*, we concluded that no reasonable officer could believe that the affidavit there contained sufficient facts on which to base probable cause. We first emphasized that, at the time the officers applied for the warrant, the law was clear that a warrant could not be broader than the probable cause on which it was based. *Id.* We also noted that, because the law

enforcement officers had planned the undercover delivery of the four sets of photos Weber had ordered, the officers were under no time pressure to make the search. *Id.* Although we did not "question the subjective good faith of the government," we concluded that "it acted entirely unreasonably in preparing the affidavit." *Id.* Indeed, we said, when the affidavit was "stripped on the fat [the "foundationless expert testimony"], it was the kind of 'bare bones' affidavit that [was] deficient under *Leon* . . . ." *Id.*

Here, as in *Weber*, the officers felt little or no time pressure to conduct the search of Gourde's residence. In fact, the investigating officers waited some four months to apply for the warrant of Gourde's residence after they discovered Gourde's membership information on the server, and Moriguchi conceded that no time pressure existed. Moreover, the officers had ample opportunity to analyze the server seized from the owner of Lolitagurls.com. *See Lacy*, 119 F.3d at 745 (noting that records on the seized computer server indicated that Lacy had downloaded six images off the computer server). Because the officers failed to take that step, or, alternatively, failed to present other target-specific corroborating information linking Gourde's two-month membership to a mixed child pornography/adult pornography website to his probable possession of child pornography, they acted objectively unreasonably in applying for and executing the warrant at issue.

CONCLUSION

[10] The district court erred in refusing to suppress the evidence seized from Gourde's computer as the affidavit failed to present sufficient indicia of probable cause. Moreover, given the completely uncorroborated evidence of probable cause, the officers acted objectively unreasonably in seeking and relying on the deficient warrant. The judgment of the district court is hereby

REVERSED.

GOULD, Circuit Judge, concurring:

I concur in Judge Brunetti's excellent opinion, the logic of which is required by our precedent in *United States v. Hay*, 231 F.3d 630 (9th Cir. 2000), *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), and *United States v. Weber*, 923 F.2d 1338, 1342 (9th Cir. 1991). I agree with the panel opinion's persuasive application of this precedent. However, were I to examine anew the issue whether law enforcement officials had probable cause to search Gourde's room and home computer for downloaded images of child pornography, and were I free to look only at first principles and Supreme Court precedent, I would be more inclined to decide that there was probable cause for this search made upon a warrant.

Gourde took affirmative steps to subscribe for a $19.95 fee to a website whose name — "lolitagurls.com" — suggests its prurient focus on young girls. The site boasts of access to "hard to find pics" of "preteen girls," and brags that it contains "over one thousand pictures of girls ages 12-17!" It is possible that Gourde subscribed to the "mixed" site solely because it hosted some legitimate adult content. But I doubt it. The evidence collected by law enforcement officers, and submitted to the magistrate who issued the warrant, was sufficient to show a "fair probability" that if police searched Gourde's computer and room, they likely would find the contraband that they suspected lay within. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The probable cause standard does not require certainty, but only such a fair probability.

The advertised focus of this website, coupled with Gourde's willingness to pay a nontrivial fee to access the site with its sleazy and illegal photos of young girls, tends to show, as a matter of relevance and probability, that Gourde

most probably downloaded illicit images and then stored them on his computer or elsewhere in his room. All that we know about human nature tells us to a high degree of probability that a person who subscribes to a website that is illicitly hawking child pornography for a monthly fee, and who remains a paying member for two additional months, probably has taken advantage of the paid subscription by downloading images from the site.[1] This is especially true in light of the fact that the administrator of "Lolitagurls.com" constantly refreshed the website with new photographs. And evidence submitted supporting the search warrant attested to the tendency of those addicted to child pornography to retain on their computers illicit materials once obtained.[2] The evidence supporting the search warrant showed that consumers of child pornography operate somewhat like pack rats, hoarding what they find.

Were one to examine this case without the constraint of our precedent, instead using only the Supreme Court's "fair probability" standard in the general probable cause context, in my view it would be permissible to conclude that law enforcement officials had adequate cause to gain the warrant to search Gourde's computer and room. *See, e.g.*, *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 841 (9th Cir. 2003) ("Probable cause means more than a bare suspicion . . . but less than absolute certainty that [a] search will be fruitful."); *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999)

[1]Had the government not commenced its sting operation two months after Gourde paid for his automatically renewable subscription, there is no telling how long Gourde would have remained a registered member of the site, or how long he would have consumed and kept its illegal contents. In any event, longer duration of access to the site for more than two months is not necessary to give confidence that Gourde downloaded and retained illicit materials.

[2]As the affidavit of the FBI agent reveals in Gourde's case, child pornography collectors are likely to amass materials without disposing of them, in part because they tend to trade information online with other child pornography collectors.

("the requisite 'fair probability' is something more than a bare suspicion, but need not reach the fifty percent mark."); *United States v. Travisano*, 724 F.2d 341 (2d Cir. 1983) (upholding a search of a suspect's residence and car because "the standard of probable cause cannot imply 'more probable than not' "; all that is required is "a fair probability that the premises will yield the objects specified in the search warrant."); *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979) (rejecting bomb suspect's argument that "probable cause" can be "define[d] . . . mathematically to mean 'more likely than not' "; "The phrase is less stringent than that. The words 'reasonable cause' are perhaps closer to what is meant."). A magistrate could reasonably conclude that a person such as Gourde would not likely pay money monthly for access to child pornography unless he expected to collect and preserve the unlawful images for later use.[3]

We should not require a more rigorous probable cause test for suspected evidence of possession of child pornography on the mistaken theory that child pornography is a victimless crime. To the contrary, we are gravely aware of the necessarily predatory nature of the child pornography market and those who traffic in it, as well as the dangerous effects of its proliferation. As I have expressed in the past, child pornography is not at all a victimless crime. *See United States v. Joyce*, 357 F.3d 921, 930 (9th Cir. 2004) (Gould, J., dissenting) ("We must recognize that the possession of child pornography, even by one who is not a purveyor, is harmful to child victims because it facilitates the illicit demand that leads to the exploitation and degradation of children for the benefit of child pornographers and those to whom they cater."). To the extent that our legal system impedes legitimate law enforcement efforts to cut off the demand and thereby affect the sup-

[3]Further, "while we insist that probable cause be shown, we give great deference to the decision of the magistrate who concludes that such a showing has been made." *United States v. Fried*, 576 F.2d 787, 791 (9th Cir. 1978) (internal quotation marks omitted).

ply of child pornography, we do a disservice to one of the most vulnerable segments of our society.

It is too bad that the Ninth Circuit's prior precedents on searches for child pornography impose a more rigorous test for probable cause than that called for by common sense and common experience, and in my view more than should be required under the Supreme Court's precedent of *Illinois v. Gates*. I join the court's well-reasoned opinion under compulsion of our precedent in *Weber*, contrasted with *Hay* and *Lacy*. But it would be better if we rethought and reformulated the requirements of our circuit law.

No. 03-30262

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICAH J. GOURDE,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Washington
at Tacoma

The Honorable Franklin D. Burgess
United States District Judge

DEFENDANT-APPELLANT'S RESPONSE TO GOVERNMENT'S PETITION FOR REHEARING AND FOR REHEARING EN BANC

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I. INTRODUCTION

The Government seeks review of the Court's decision in this case on the ground that it "is in conflict with the Supreme Court precedents regarding probable cause" and will "substantially impact the government's ability to pursue child pornography investigations." Govt. Petition at 2-3. To the contrary, the Court analyzed the controlling Supreme Court and Ninth Circuit opinions, as well as relevant cases from other circuits, and issued a decision that Judge Gould, in his concurrence, endorsed as a "persuasive application of this precedent." United States v. Gourde, 382 F.3d 1003, 1014 (2004) (Gould, J., concurring). Far from creating a more stringent standard for child pornography investigations, the Court found that the Government's warrant application was based on an "unprecedentedly lengthy and improbable" string of inferences and fell so short of establishing probable cause that it could not even be salvaged by the good faith exception to the exclusionary rule. Id. at 1011. Given the Court's careful consideration of the record, correct application of precedent, and its conclusion that the Government had ample time to undertake obvious investigatory steps that might have substantiated its "boilerplate" application, the Government's request for further consideration of this case should be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Investigation and Search Warrant

From August 30, 2001, through December 2001, the FBI had investigated an Internet website called "Lolitagurls.com." ER 6.[1] During the investigation, an undercover FBI agent used a credit card to purchase a membership to the website, as visitors to the site could not view the images it contained without a membership. Once a visitor joined the site, it automatically renewed his membership and assessed a monthly fee unless he returned to the site and "took steps to cancel a membership." ER 4-6.

The first page of the website advertised "hard to find pics" of "young girls" and "Lolitas." ER 5. This page also contained a notice that the site "is in full compliance with United States Code Title 18 Part I Chapter 110 Section 2256," thereby indicating that the "girls" depicted on the site were over the age of 18. ER 5. From there, a visitor to the site could go to a second page that posted member "comments," offered a subscription and, at some unspecified time, also included "thumbnail" images the affidavit characterized as "some prepubescent" and "nude" girls. Id. at ¶ 4(a). Although the affidavit noted that images on the site were changed "approximately every twelve to twenty days," ER 6 at ¶ 4(b), it did

[1]Citations to "ER" refer to Appellant's Excerpt of Record.

not state when the "nude" images on the subscription page appeared there or how long they were posted.

After several months of visiting the site, the agent ultimately determined that it offered a broad mix of "adult pornography, child pornography, and child erotica." ER 6 at ¶ 4(c). The affidavit did not claim that any of the adult pornography or "child erotica" was illegal, or reveal what proportion of the site consisted of "child pornography." Instead, the affidavit stated that "some" images on the site depicted "the lascivious display of the breasts and genitalia of girls under the age of eighteen." Id. The affidavit did not state what expertise or qualifications, if any, the undercover agent had to estimate the age of the girls.

In January 2002, after completing this preliminary investigation, the FBI executed a search warrant in Iowa that resulted in the seizure of the computer which operated as the website's "server." ER 7. The FBI's examination of the Iowa computer revealed Gourde's e-mail address, birth date and the fact that he was automatically billed for two months of membership. ER 7, 19-20. No other information relating specifically to Gourde or alleged activities by him, on the website or elsewhere, was set forth in the affidavit.

Instead, the affidavit consisted almost entirely of approximately 14 pages of legal definitions, general information about the Internet, and a summary of "child

pornography collector characteristics." ER 7-19. The FBI "expert" quoted in this latter section, however, was not involved in the investigation of this case. Moreover, the only information relating to Gourde referenced in this section is the fact that he had obtained a website membership. ER 19-20.

On May 16, 2002, approximately four months after the Iowa server had been seized, FBI Special Agent David Moriguchi applied for a warrant to search Gourde's home. ER 3. Five days later, the warrant was executed, his computer was seized and its contents were searched. ER 61-62.

B. The Suppression Hearing

Mr. Gourde moved to suppress the evidence obtained pursuant to the warrant on the ground that the affidavit did not establish probable cause. A motion hearing was held before the Hon. Franklin D. Burgess on February 19, 2003. ER 40-137.

At the hearing, Agent Moriguchi testified about the preparation and contents of the warrant application, ultimately conceding that his affidavit contained no evidence that Gourde had ever possessed child pornography:

> Q. Can you please show me where in the affidavit you prepared that you provided any evidence, in any way, that Mr. Gourde actually downloaded or otherwise received an image?

A. It was probable cause to believe that he would have downloaded images by the fact that he had joined the web site. There was no specific knowledge that he actually downloaded images.

Q. So the answer to my question is, the affidavit does not contain any evidence whatsoever that Mr. Gourde actually downloaded, received, transmitted, or in any other way actually possessed child pornography or any other images from the server?

A. Yes, that's correct.

ER 63-64. Nor was there any other evidence that indicated that Gourde had possessed contraband images from some other source, transmitted any such images, communicated with anyone about child pornography, or in any other way may have committed a crime. *See* ER 68, 79-80, 87-88, 90.

Agent Moriguchi further testified that information about the activities of a subscriber on the website would have been routinely stored in the website's server:

Q. It's fair to say that a record of the operations of this web site, the images it contained, when and if they were sent out, e-mailed, that information could have been traced from the Iowa server?

A. Yes.

Q. That would include information that would inform the F.B.I. about whether somebody downloaded images from the site, when they downloaded them, or other information indicating exactly what was sent from Iowa?

A. Yes.

ER 67. Moriguchi also confirmed that the F.B.I. seized the Iowa server approximately four months before applying for a warrant to search Gourde's home and "no effort was made to determine if any specific image had been downloaded" by him. ER 68.

With no evidence that Gourde had ever received or possessed images of child pornography, the warrant affidavit relied solely on the fact that he had subscribed to the website to establish probable cause. ER 59-60. In this regard, however, Moriguchi acknowledged that the website contained a prominent notice that its contents complied with federal law and did not contain images of actual minors. Hence, it would at least initially appear to a site visitor that its contents were legal and there was no way to determine the actual contents before subscribing. ER 69-70, 75. Moreover, Moriguchi confirmed that the site contained a mix of legal and illicit pornography that, as far as the affidavit showed, may have consisted of "10 percent contraband images and 90 percent adult images." ER 52, 74-75. There was also no evidence in the affidavit that Gourde viewed anything other than the standard adult fare when he visited the site. ER 89-90.

To obtain a subscription, a visitor had to move from the site's home page to a second page. ER 5 at ¶ 4(a). At some unknown point in time during the F.B.I.

investigation, this page contained several "thumbnail" images that were described in the affidavit as "lascivious" pictures of "young" girls. ER 6, 70. However, no pictures from the site were included in the warrant application for independent review by a magistrate. Agent Moriguchi also acknowledged that nothing in the affidavit indicated that the undercover agent who had viewed the pictures had any training or expertise in estimating the age of individuals depicted in a picture. ER 73-74.

Agent Moriguchi further explained that the "thumbnails" referenced in the affidavit were small pictures that cannot be viewed in detail unless they are enlarged. ER 89. While the undercover agent had enlarged the images, it would not have been obvious to Gourde or any other site visitor that the "thumbnails" were "lascivious." Id. In addition, the undercover agent had investigated the website between August 2001 and December 2001. ER 65, 71. Although he had found that at least some images on the website were routinely changed every twelve to twenty days, the affidavit did not indicate if the images described by the agent were posted at the time Gourde visited the site. ER 51, 70-73.

The affidavit did state that Gourde had purchased a subscription to the site for $19.95. ER 51, 54-55. The affidavit did not claim, however, that Gourde had entered the site more than once, at the time he purchased a subscription. Although

Gourde was billed for two months, the subscription was renewed automatically once he provided a credit card number, regardless of whether he ever visited the site again. ER 60, 75-76. Consistent with these facts, Moriguchi agreed that "all the affidavit, in fact, establishes is that [Gourde] logged in one time to subscribe, may very well have looked at adult pornography on the site and never gone back to the site." ER 77.

Finally, FBI Special Agent Paul Simpson testified in general terms that website images, including thumbnails, may be stored in "temporary files" on the computer of a person who visits the site. ER 94-95. The agent acknowledged, however, that there was no claim in the affidavit that any images from the site were somehow automatically transmitted to, or stored on, Gourde's computer. ER 98-100. Simpson also stated that he had no expertise in computer or Internet technology. ER 97. Finally, the agent conceded that there are many websites that advertise pictures of young girls and actually "offer 18-year-olds or young-looking adults as underage." ER 103.

C. The District Court's Ruling

The court found that "the probable cause issue seems to pull from subscription and whether that in itself is enough." ER 132. Although the court concluded that the subscription alone was "probably not" sufficient to support

probable cause, the court nevertheless went on to uphold the search of Gourde's home based on a "common sense" consideration of the totality of the circumstances. ER 132-33.

III. THE PANEL OPINION

A panel of this Court held that the warrant affidavit did not establish probable cause to search Gourde's home and computer because there was no evidence that he had actually received or possessed illicit images by any means. The Court concluded that this result was dictated by the facts contained in the four corners of the affidavit, the undisputed testimony of the agent who prepared the affidavit, and analysis of several of its prior cases: United States v. Weber, 923 F.2d 1338 (9th Cir. 1990); United States v. Lacy, 119 F.3d 742 (9th Cir. 1997); and United States v. Hay, 231 F.3d 630 (9th Cir. 2000).

Weber, the Court explained, held that "[e]vidence the defendant has ordered child pornography is insufficient to establish probable cause to believe the defendant possesses such pornography." Gourde, 382 F.3d at 1009-10. The defendant in Weber had ordered explicit photos in response to an advertisement offering "boys and girls in sex action." The Government obtained a search warrant, arranged a controlled delivery of the items, and ultimately recovered both

the photos that had been delivered to him and a stash of other child pornography. Id. at 1341. This Court reversed:

> On these facts, to find probable cause . . . would be to justify virtually any search of the home of a person who has once placed an order for child pornography – even if he never receives the materials ordered.

Id. at 1344. The Court went on to note that were these facts sufficient to find probable cause, "[a]ll the government would have to do is send out phony advertisements for child pornography, wait for responses, and immediately execute warrants to search the houses of those responding affirmatively." Id.

In the instant case, the Court recognized that the Government offered even less particularized information in its warrant application. In Weber, the Government had at least established that the defendant had previously tried to obtain probable contraband, was actively seeking material from an advertisement that unequivocally offered child pornography, and had actually ordered specific items. Here, by contrast, the affidavit showed only that Gourde had accessed a website that contained a mix of mainstream sexually-oriented material and "lascivious" images of minors. The affidavit contained no information indicating that Gourde ever possessed or even viewed any of the child pornography on the website. Thus, the Court ruled "much like the catalog order in Weber, the affidavit here revealed only that Gourde had subscribed, and thereby received

access, to a mixed-pornography website, which is insufficient to create a fair probability that evidence of possession of child pornography would be found on Gourde's computer or related equipment." Gourde, 382 F.3d at 1013.

The Court also discussed and contrasted the decisions in Lacy and Hay. *See* Gourde, 382 F.3d at 1010-12. The Court noted that in Lacy the warrant affidavit established that the defendant had actually downloaded from a host site specific images of minors engaged in explicit sexual activity. Gourde, 382 F.3d at 1010 (citing Lacy, 119 F.3d at 745). Similarly, in Hay the Court "emphasized the importance of evidence bearing on the defendant's actual possession of child pornography." Gourde, 382 F.3d at 1010. There, the Court upheld the search of a computer because the warrant affidavit had showed "that Hay had actually received via direct digital transfer nineteen images of minors engaged in sexually explicit activity – evidence supporting inferences that Hay had communicated with the sender, authorized the images' transfer, and possessed contraband images." Gourde, 382 F.3d at 1010. The Hay affidavit also contained particularized information about the defendant, including the fact that he maintained a personal website that showed an "extreme interest in young children." Id.

In contrast to Lacy and Hay, the Court noted, the affidavit in this case merely showed that Gourde had subscribed to a mixed-content website. Gourde,

382 F.3d at 1010. The Court therefore concluded that "[a]n affidavit establishing that it is possible, with some straining, to *infer* that Gourde – along with every other member of every site on the Internet containing what appears to be child pornography – might possess child pornography is not enough to justify a warrant to search Gourde's home and seize his computer." Id. at 1011.

Having determined that the affidavit did not establish probable cause, the Court considered whether the search could nevertheless be upheld based on the good faith exception. The Court found that agents were under no time pressure, had failed to analyze the server for evidence that Gourde had downloaded images from it, and had similarly not presented "other target-specific corroborating information linking Gourde's two-month membership to a mixed child pornography/adult pornography website to his probable possession of child pornography." Id. Given these facts, the Court concluded that the agents preparing the warrant had "acted objectively unreasonably in applying for and executing the warrant at issue." Gourde, 382 F.3d at 1014.

IV. STANDARD FOR ORDERING EN BANC DETERMINATION

Federal Rule of Appellate Procedure 35(a) provides: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's

decisions; or (2) the proceeding involves a question of exceptional importance." Ninth Circuit Rule 35-1 further states that an appropriate ground for suggesting a rehearing en banc is the existence of a conflict between the panel opinion and an existing opinion by another court of appeals, where the opinion "substantially affects a rule of national application in which there is an overriding need for national uniformity."

V. ARGUMENT

In its petition for review, the Government claims that the Court departed from precedent and now requires law enforcement "to prove that the crime of possession of child pornography has definitively occurred before it can search for evidence of the crime." Govt. Petition at 12. To the contrary, the Court relied on well-established authority to reject a warrant based on an affidavit that contained no evidence that Gourde possessed contraband, despite the fact that information that might have established probable cause was available to investigators for several months preceding the search of Gourde's home. As a result, even the FBI agent who prepared the warrant application conceded that it "does not contain any

evidence whatsoever" that Gourde "downloaded, received, transmitted or in any other way actually possessed child pornography." ER 53-64.[2]

While the Government is correct that "definitive" evidence of a crime is not required to support a search warrant, it is equally true that the Court in this case properly rejected the "unprecedently lengthy and improbable" chain of inferences that the affidavit offered as a substitute for facts. Gourde, 382 F.3d at 1011. Indeed, the warrant application was so deficient that the Court concluded no reasonable officer could have believed that it was adequate. The Court particularly noted that the minimum requirements for establishing probable cause in this type of case are well-established; investigators "felt little or no time pressure to conduct the search of Gourde's residence"; and investigators "had ample opportunity to analyze the server" that could have provided evidence

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[2]The Government's suggestion that viewing an image from a website automatically results in possession of the image is misleading. *See* Govt. Petition at 18 n. 3. Instead, as noted, Agent Moriguchi conceded at the suppression hearing that the affidavit contained no evidence that Gourde possessed contraband images by any means. *See, e.g*, ER 63-64. Although the Government floated an argument at the hearing that images may have been "automatically downloaded," the Court expressly found that the warrant application contained no evidence that there had been automatic transmissions from the website. Gourde, 382 F.3d at 1013; *see also* United States v. Perez, 247 F. Supp.2d 459 (S.D.N.Y.2003)(finding that the Government had acted with reckless disregard for the truth in claiming that the defendant had received automatic transmissions of child pornography); United States v. Strauser, 247 F. Supp.2d 1135 (E.D. Mo. 2003) (same).

tending to show actual possession, yet they elected not to do so. Gourde, 382 F.3d at 1014. *Cf., e.g.,* United States v. Upham, 168 F.3d 532, 533 (1st Cir. 1999) (warrant for computer sought after agents received child pornography and identified sender's computer through server records); United States v. Lamb, 945 F. Supp. 441, 445-46 (N.D.N.Y. 1996) (warrant obtained after showing that computer to be searched involved in over 100 transmissions of child pornography over an 8-month period). Plainly, if the Court concluded that the warrant application was so deficient that even the good faith exception is inapplicable, it is not credible for the Government to claim that it is the Court that has misunderstood what is required for probable cause.

More specifically, once all the "boilerplate language" was stripped from the affidavit, the Court concluded that it "established only that Gourde subscribed to a mixed pornography website and remained a member for two months." Gourde, 382 F.3d at 1013. While the Government's petition glosses over the fact that the site contained both legal material and some unknown quantity of illicit images, and repeatedly characterizes the site as a "child pornography website," the Court recognized the settled proposition that mere membership in a group that has both legitimate and illegitimate purposes does not, by itself, provide probable cause to believe that a member is engaged in illegal activity. *See, e.g.*, United States v.

Rubio, 727 F.2d 786, 793 (9th Cir. 1984) (a suspect's membership in an organization, without more, will not establish probable cause unless the group is engaged in criminal activity to such an extent that it is "wholly illegitimate"). This is especially true where, as here, for all the affidavit showed the bulk of the site's content was legal; there was no evidence that the suspect images referenced in the affidavit were even "posted" on the site at the time Gourde subscribed; and the warrant application failed to include copies of any images for the magistrate's review. *See* United States v. Smith, 795 F.2d 841, 847 (9th Cir. 1986) (criticizing investigators' failure to include copies of alleged child pornography pictures with warrant application).

The Government nevertheless complains that the Court reached its conclusions "based upon a perceived concession" that investigators could have readily found corroborative data, if it existed, that was needed to establish probable cause. *See* Govt. Petition at 2. While the Government goes on to claim that the "transcripts of the suppression hearing do not clearly evidence such a concession," id., the petition omits a summary of the facts established at the hearing and ignores Agent Moriguchi's testimony about the website server and the type of information it would have contained. *See, e.g*, ER 67-68. A complete

review of the record demonstrates that the Court analyzed the relevant facts fairly and correctly.

Most significantly, perhaps, the Court found that the evidence at the suppression hearing established that investigators "had the means to actually track Gourde's usage of the site to determine whether he downloaded images" and the Government either "(1) chose not to avail itself of the information or (2) found no evidence of downloading." Gourde, 382 F.3d at 1012. Thus, unlike the searches at issues in Lacy and Hay, the Government utterly failed to present "target-specific or corroborating information" linking Gourde's membership in a mixed content website to his probable possession of child pornography. Id. at 1014. The Court went on to note that the lack of any effort to collect particularized information about Gourde's activities "provides an important rebuttal to the argument that not finding probable cause here will inhibit the government's ability to prosecute child pornographers in the future." Id. at 1012.[3]

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[3] The Government nevertheless suggests that child pornography investigations will be curtailed to "cases where the Government is lucky enough to seize the website sever that created a means of tracking access and downloads from the website." Govt. Petition at 2. But, as a practical matter, the Government can only identify suspects in cases like this one by first targeting websites for investigation, locating and seizing their servers, and then examining their databases for membership records. Since the same computers typically contain information about both the identity of members and their activities on the site, it is

(continued...)

Finally, the Government suggests that the Court should grant review because there is "tension" between the panel opinion and the decision in United States v. Froman, 355 F.3d 882 (5th Cir. 2004). Govt. Petition at 14-15. As the panel noted, however, the Froman case involved an affidavit which established that the defendant had in fact received e-mail transmissions containing child pornography from a website whose "singular goal" was to collect and distribute child pornography. *See* Gourde, 382 F.3d 1012-13. 6-57; Froman, 355 F.3d at 884. The Froman affidavit also contained particularized information about the defendant, including "personalized information regarding [his] interest in child pornography." Gourde, 382 F.3d at 1012. Here, by contrast, the affidavit does not claim that Gourde received images from the Iowa website or any other source; the

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[3](...continued)
not too much to expect the Government to undertake the additional analysis necessary to establish probable cause to believe that any particular member received images from the site. Recognizing this point, the panel stated the following:

> Simply put, there is no reason to think that the government's access to corroborating information in this case is atypical; once the government has gone through the motions necessary to procure a membership list (i.e. seized a website's computer and gained access to the website server), it likely also can access the necessary tracking information to demonstrate whether or not the subject of the investigation has actually downloaded child pornography.

Gourde, 382 F.3d at 1012.

website was not dedicated to child pornography; and there was no particularized information about Gourde in the affidavit apart from his date of birth, address and the fact that he had subscribed to the site. Thus, if anything, the decision in Froman lends further support to the panel opinion, since it underscores the need for sufficiently particularized information showing receipt or possession of illicit images to establish probable cause.

In sum, rehearing should not be granted because the Court applied the controlling precedents correctly to the facts in this case, thereby maintaining "uniformity of the court's decisions." *See* Fed. Rule. App. Pro. 35(a)(1). Following this authority, the Court held correctly that mere membership in a site that offered both legal and contraband content, in the absence of any facts that might show that a suspect received illegal images, is insufficient to establish probable cause to believe that he possesses child pornography. Indeed, if the Court had deemed the search valid, a person could access a website because he relies on the legal notice of compliance with federal law; discover it contains child pornography; and immediately exit the site, yet remain indefinitely vulnerable to a search of his home. This is precisely the result that the Court, in Weber and its progeny, has sought to prevent by striking an appropriate balance between Fourth

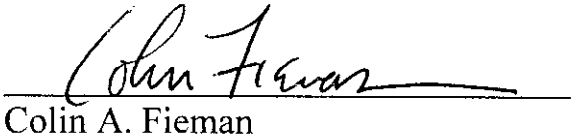
Amendment rights and the Government's need to prosecute Internet-related crimes. The Court struck that balance here, and further review should be denied.

VI. CONCLUSION

For the reasons stated herein, the Government's petition for en banc review should be denied.

DATED this 7th day of January, 2005.

Respectfully submitted,



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